IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.271 of 2005
Date of decision: 7.9.2006

Commissioner of Income Tax-I, Ludhiana

...Appellant

v.

M/s Abhishek Industries Limited, 85, Industrial Area A, Ludhiana.

.....Respondent

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. SK Garg Narwana, Advocate.
Ms.Radhika Suri, Advocate.

JUDGMENT:

This appeal has been preferred by the revenue proposing following substantial questions of law:-

> "i) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in allowing the relief of Rs.38,085/- made on account of interest on interest free advances given to sister concern for non-business purposes?
>
> ii) Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in law in allowing relief of Rs.71,46,239/- on account of sales tax subsidy by treating the same as

> capital receipt, ignoring the decision of the Hon'ble Supreme Court in the case of M/s Sahni Steel & Press works Limited v. CIT reported in 228 ITR 253?"

The Assessing Officer during assessment for the year 1996-97 made addition of Rs.38,085/- towards interest on interest free advance given to sister concern for non-business purpose. Amount of Rs.71,46,239/- received on account of sales tax subsidy was treated as revenue receipt. The assessee preferred an appeal which was dismissed by CIT(A). On further appeal, the Tribunal set aside addition towards interest and also held that sales tax subsidy received by the assessee should be treated as capital receipt. Hence this appeal.

We find that the questions posed have been gone into at length in our judgment in **Commissioner of Income Tax-I, Ludhiana v. M/s Abhishek Industries Limited, Ludhiana**, ITA No.110 of 2005, decided on 4.8.2006. After reviewing case law on the point, it was held that interest on the loan raised to the extent the amount is advanced to sister concern for non-business purposes could not be allowed as a deduction to the assessee. It was also held that amount received on account of sales tax subsidy could not be treated as capital receipt. Relevant observations in the said judgment are as under:-

> "As far as the issue of establishment of nexus of the funds borrowed vis-a-vis the funds diverted towards sister concern on interest free basis is concerned, in our view, the stand of the assessee that the onus of proving the nexus of funds available with the assessee with the funds advanced to the sister concerns without interest is on the Revenue is not correct. Section 36(1)(iii) of the Act provides for deductions of interest on the loans raised for business purposes. Once the assessee claims any such deduction in the books of accounts, the onus will be on the assessee to satisfy the Assessing Officer that whatever loans were raised by the assessee, the same were used for business purposes. If in the process of examination of genuineness of such a deduction, it transpires that the

assessee had advanced certain funds to sister concerns or any other person without any interest, there would be very heavy onus on the assessee to be discharged before the Assessing Officer to the effect that inspite of pending term loans and working capital loans on which the assessee is incurring liability to pay interest, still there was justification to advance loans to sister concerns for non-business purposes without any interest and accordingly, the assessee should be allowed deduction of interest being paid on the loans raised by it to that extent. In our view, even the plea of nexus of loans raised by the assessee with the funds advanced to the sister concerns on interest free basis, may be it is pleaded to be out of sale proceeds or share capital or different account cannot be accepted.

Entire money in a business entity comes in a common kitty. The monies received as share capital, as term loan, as working capital loan, as sale proceeds etc. do not have any different colour. Whatever are the receipts in the business, that have the colour of business receipts and have no separate identification. Sources has no concern whatsoever. The only thing sufficient to disallow the interest paid on the borrowing to the extent the amount is lent to sister concern without carrying any interest for non-business purposes would be that the assessee has some loans or other interest bearing debts to be repaid. In case the assessee had some surplus amount which, according to it, could not be repaid prematurely to any financial institution, still the same is either required to be circulated and utilised for the purpose of business or to be invested in a manner in which it generates income and not that it is diverted towards sister concern free of interest. This would result in not presenting true and correct picture of the accounts of the assessee as at the cost being incurred by the assessee, the sister concern

would be enjoying the benefits thereof. It cannot possibly be held that the funds to the extent diverted to sister concerns or other persons free of interest were required by the assessee for the purpose of its business and loans to that extent were required to be raised. We do not subscribe to the theory of direct nexus of the funds between borrowings of the funds and diversion thereof for non-business purposes. Rather, there should be nexus of use of borrowed funds for the purpose of business to claim deduction under Section 36(1)(iii) of the Act. That being the position, there is no escape from the finding that interest being paid by the assessee to the extent the amounts are diverted to sister concern on interest free basis are to be disallowed.

If the plea of the assessee is accepted that the interest free advances made to the sister concerns for non-business purposes was out of its own funds in the form of capital introduced in business, that again will show a camouflage by the assessee as at the time of raising of loan, the assessee will show the figures of capital introduced by it as a margin for loans being raised and after the loans are raised, when substantial amount is diverted to sister concerns for non-business purposes without interest, a plea is sought to be raised that the amount advanced was out of its capital, which in fact stood exhausted in setting up of the unit. Such a plea may be acceptable at a stage when no loans had been raised by the assessee at the time of disbursement of funds. This would depend on facts of each case.

Section 106 of the Indian Evidence Act or the principles analogous thereto places the burden in respect thereof upon the assessee, as the facts are within its special knowledge. However, a presumption may be raised in a given case as to why an assessee who for the purpose of running its business is required to borrow

money from banks and other financial institutions would be giving loan to its subsidiary companies and that too when it pays a heavy interest to its lenders, it would claim no or little interest from its subsidiaries."

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"There is no quarrel even with the example, referred to as above, as the observations recorded therein are borne out from the discussions in the body of the judgment. In the present case, all what is claimed and is put on record by the assessee is that sales tax subsidy is being received by it from the State. It is not disputed that the same is being received on recurring basis after the unit came into production. There is no document or material placed on record by the assessee to substantiate its plea that the subsidy of the kind under consideration was to enable it to acquire new plant and machinery or as an aid to set up the industry. Rather, it is quite evident that subsidy in the present case is in the form of an operational subsidy provided by the State after the industry had been set up and commenced commercial production. The subsidy is not in the form of a financial assistance granted to the assessee for setting up of the industry. The endeavour of the State was to provide the newly set up industries a helping hand for a specified period to enable them to be viable and competitive vis-a-vis the industries which were already set up and were in production since long. The assessee has failed to establish on record that kind of subsidy involved in the present case was in the form of a subsidy to enable it to carry out capital investment. In the absence thereof, it cannot possibly be presumed by the authorities that such a subsidy would be in the nature of capital subsidy. The onus to provide the same strongly laid on the assessee, which it had failed to discharge."

In view of the above, questions have to be answered in favour of the revenue and against the assessee.

Accordingly, this appeal is allowed and the order of the Tribunal is set aside.

(Adarsh Kumar Goel)
Judge

Sept. 07, 2006
'gs'

(Rajesh Bindal)
Judge